Supreme Court, U.S.
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No. 90-1311

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THEODORE SMITH,
Petitioner,
v.
CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff in an action brought under 42 U.S.C. § 1983 is limited to the recovery of nominal damages for an alleged unconstitutional arrest where:

(a) the arresting officers allegedly fabricated evidence against the plaintiff but probable cause for the arrest existed independently of the disputed evidence, and

(b) the plaintiff did not argue for punitive damages in either of his two appeals, instead claiming only that he was entitled to compensatory damages.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 913 F.2d 469 and is reprinted at Pet. App. 1a-10a.

The opinion and order of the United States District Court for the Northern District of Illinois (Bua, D.J.) dated February 22, 1989, have not been reported. They are reprinted in the appendix to this brief at 1a-4a. A copy of the district court's order of February 13, 1989 (ruling on the motion in limine), is reprinted at Pet. App. 16a.

An earlier opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported at 859 F.2d 31.

STATEMENT

On April 25, 1968, Shirley Johnson reported to the Chicago Police Department that she had been raped. R. Item 155, Trial Tr. May 18, 1970, at 30, 54. The police took Johnson to Billings Hospital where she was examined by a physician. *Id.*; R. Item 21, Ex. E. As part of the examination, a vaginal swab was prepared to ascertain the presence of semen; no semen was found. R. Item 21, Ex. A.

Approximately three hours after Johnson was examined, Police Officer Chilla went to Billings Hospital and picked up a sample of the vaginal swab taken from Johnson. R. Item 86, Ex. 1-A (Chilla affidavit). Chilla took the sample to the Chicago Police Department's Crime Laboratory where it was tested on April 26, 1968, for the presence of semen; the test revealed that semen was present. R. Item 37, Ex. E-1.

Between April 25 and April 28, 1968, detectives Cole and Downey of the Chicago Police Department went to petitioner Theodore Smith's residence on two occasions but were unable to gain entry. R. Item 37, Ex. J-1. Three days after the rape, on April 28, 1968, Johnson went to Area 2 police headquarters to view photographs of known sex offenders; the photograph of the person she identified as her attacker was that of petitioner Smith. R. Items 37, Ex. J-1; 155, Trial Tr. May 18, 1970, at 55-59.

The case was reassigned to Police Officers Richard O'Connell and Jerry Springer because they knew Smith. R. Item 37, Ex. J-1. In the days that followed, O'Connell and Springer tried unsuccessfully to locate Smith. *Id.*

On May 8, 1968, Johnson signed a complaint alleging that Smith had raped her on April 25, 1968. R. Item 37, Ex. I-1. A warrant was issued based on the complaint and on the victim's statements to the judge who was asked to issue the warrant. R. Items 37, Ex. J-1; 131,

Final Pretrial Order, Stipulation of Uncontested Facts at 5. On May 12, 1968, the police learned that Smith was working at the Ascot Motel. *Id.* Police Officer Reed, who was never a defendant in this case, arrested Smith later that day. *Id.* Smith posted bond and was released. R. Item 131 at 5.

The case went to trial before a judge on May 18, 1970. R. Item 155, Trial Tr. May 18, 1970. Johnson testified that Smith had raped her. *Id.* at 29-118. Smith also testified and denied raping Johnson. According to Smith, he and Johnson agreed to a paid sexual encounter; however, the agreement went "sour," and Smith stated that no sexual activity of any kind occurred. *Id.* at 168-69; 178-80. At the end of all testimony, the state's attorney and counsel for Smith stipulated to the admission of the results of the tests performed on both samples taken from the vaginal swab. *Id.* at 213-16. At the conclusion of trial, the court found the defendant guilty, relying solely on the testimony of Johnson and Smith.[1] *Id.* at 218-19.

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[1] In announcing judgment against Smith the court stated:

> In reviewing all this I—while the defendant was on the stand—I'm sorry about what his problem was, but four or five different places, even though they may be called small, he gave me the impression that I just couldn't believe him.
>
> As I read the rape cases, it is easy to challenge and hard to prove and hard to defend against but immediately after leaving the place, she had a conversation with the roommate. Police came. They went to the same building. She saw pictures. Pointed him out. That was the man. Even though he was arrested some twelve or thirteen days later.
>
> I can see no reason why the young lady would say these things. I can see why he would say he didn't, because he's the defendant.
>
> Because of the discrepancies that I have marked down, whether he was confused or not, I don't know about when he went to work, about when he went to the tavern, the difference in the amount of monies he offered here, the threatening, if there was the threatening, four or five different discrepancies in his testimony—the other gentleman that testified for him admitted he

Smith's conviction was affirmed on direct review. *People v. Smith*, 8 Ill. App. 3d 36, 288 N.E.2d 694 (1972). Smith was unsuccessful in obtaining either state or federal collateral relief. *People v. Smith*, 56 Ill. App. 3d 569, 371 N.E.2d 921 (1977); R. Item 75 (order denying federal writ of habeas corpus).

Smith filed his original complaint in this action pro se on May 10, 1979, under 42 U.S.C. § 1983. R. Item 1. He named as defendants the City of Chicago; James B. Conlisk, then Superintendent of Police; and City of Chicago Police Officers Springer, O'Connell, and Calabrese. Smith's complaint alleged that he was convicted of rape based, in part, on evidence manufactured by the defendant police officers. R. Item 1. The specific evidence allegedly fabricated was a sample of the vaginal swab taken from the rape victim and tested by the police department's crime laboratory. R. Item 1 at 2. Smith alleged that the sample from the swab tested at Billings Hospital, the treating hospital, did not reveal the presence of semen, while the sample tested by the city's crime laboratory did. *Id.* at 6. Smith further alleged that the fabricated evidence was used against him at trial because he failed to pay a "bribe" of $500 to defendants Springer and O'Connell. *Id.* at 9. Smith sought damages for deprivation of liberty, deprivation of due process, and denial of his right to equal protection of the law. *Id.* at 5, 7, 11, 12.

In July 1981, the district court appointed counsel to represent Smith. On December 22, 1981, the court granted a motion to dismiss the City of Chicago and Superintendent Conlisk from the action. R. Item 51. The remaining defendants' motions to dismiss on grounds of

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heard nothing, didn't see anything except them walking down the street. Didn't know anything. Didn't hear what was said. So, I think for those reasons there will be a finding of guilty. There will be a judgment on the finding.

R. Item 155, Trial Tr. May 18, 1970, at 218-19.

collateral estoppel and the statute of limitations were denied. R. Items 51, 67. Smith's motion to file an amended complaint was granted, R. Item 67, and his counsel filed an amended complaint on November 5, 1984, naming as defendants Chicago Police Officers Jerry Springer, Richard O'Connell, Ralph Calabrese, Daniel Chilla, Police Detectives Cole and Downey, and Police Sergeant Kelly. R. Item 68. Detective Cole died during the pendency of the action, R. Item 96, and Smith later dismissed defendants Calabrese, Downey, and Kelley. R. Items 95, 96.

On February 6, 1987, the district court dismissed the case. Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, which reversed and remanded for trial. *Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988) (*Smith I*).

On remand, after the parties had filed briefs describing what they expected to prove at trial, the district court granted the defendants' motion in limine, which barred Smith from seeking "relief for damages related to, or arising from, his criminal conviction." R. Item 146; Pet. App. 16a. On February 22, 1989, the parties agreed to substitute the City of Chicago for the remaining defendants (Springer, O'Connell, and Chilla) and further agreed to entry of judgment for the plaintiff for nominal damages plus $5,000 in attorney's fees. The parties also agreed that the judgment would neither constitute an admission of liability on the part of the defendants nor preclude the plaintiff from appealing the district court's granting of defendants' motion in limine. R. Items 148, 149, 150. Smith appealed. On September 21, 1990, the Seventh Circuit affirmed the district court's order of February 22, 1989. *Smith v. City of Chicago*, 913 F.2d 469 (Pet. App. 1a-10a (*Smith II*)). The Seventh Circuit denied Smith's petition for rehearing on November 16, 1990.

ARGUMENT

THE SEVENTH CIRCUIT'S DECISION THAT SMITH WAS ENTITLED TO ONLY NOMINAL DAMAGES IS CONSISTENT WITH THIS COURT'S CASES AND THE LAW OF OTHER CIRCUITS.

The Seventh Circuit held in this case that petitioner was entitled to only nominal damages on his claim under 42 U.S.C. § 1983 that he had been deprived of liberty without due process as a result of the alleged fabrication of a police laboratory report used in the state's successful prosecution of Smith for rape. Pet. App. 5a.[2] The court concluded that since Smith's arrest was based upon probable cause independent of the allegedly fabricated report (the victim's identification of Smith as the rapist and a valid arrest warrant), that report did not cause him any actual damages. *Id.* at 10a. Having held in an earlier appeal that Smith could not collaterally attack the propriety of his subsequent conviction and incarceration in this section 1983 action, a ruling Smith does not challenge, the court below held that Smith was limited to the recovery of nominal damages because he would have been arrested whether or not the defendants fabricated a laboratory report. *Id.*

Smith has sought review by this Court, claiming (Pet. at 7-8) that the Seventh Circuit's decision conflicts with *Carey v. Piphus*, 435 U.S. 247 (1978), and with cases in other circuits interpreting *Carey*. This claim is meritless and, as shown below, the Seventh Circuit correctly applied settled law to the facts of this case.

A. The district court's ruling on nominal damages in this case was made on remand from the Seventh Circuit's decision in *Smith I*. In *Smith I*, the Seventh Circuit held that the plaintiff would be entitled to damages arising from the defendants' alleged fabrication of evidence but

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[2] As discussed *infra* at 10-11, Smith did not argue in either of his appeals that he was entitled to punitive damages.

only if he could prove "that the defendants fabricated evidence leading to his false arrest and subsequent unreasonable seizure, *see, e.g., Olson v. Tyler*, 825 F.2d 1116 (7th Cir. 1987); *Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981), causing him to suffer damage." 859 F.2d at 34.

The "subsequent unreasonable seizure" to which *Smith I* referred is the loss of liberty caused by Smith's arrest. This is made plain by the two cases cited in support of the holding, *Olson* and *Bohannon*, both of which held that damages are available for false arrest and the false imprisonment necessarily stemming from the false arrest. Thus, under *Smith I*, Smith was required to link the alleged fabricated evidence to a false arrest and then to a specific injury resulting from the false arrest. *Smith I*, 859 F.2d at 34. If, however, the arrest had a valid basis quite apart from the fabricated evidence, Smith could not recover more than nominal damages. In other words, under *Smith I*, Smith was entitled to more than nominal damages only if he would not have been arrested but for the defendants' alleged improper conduct in manufacturing the sample that tested positive for semen. As the district court found on remand, Smith could not make this showing, and thus as a matter of law he was not entitled to more than nominal damages.[3]

The record shows that there was an independent and lawful basis for Smith's arrest. On April 28, 1968, three days after the rape, Johnson went to Area 2 police headquarters, viewed pictures of known sex offenders, and picked out Smith as the man who raped her. R. Item 155, Trial Tr. May 18, 1970, at 55-59. On the strength of that identification alone, the police had probable cause to

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[3] It may have been possible for Smith to show some injury, apart from his incarceration, flowing separately from the fact that evidence was manufactured. If so, he might have been able to recover for that injury. On remand from *Smith I*, however, Smith chose not to introduce evidence of any element of such a claim.

arrest Smith. *See United States v. Anderson*, 533 F.2d 1210, 1213 (D.C. Cir. 1976) (probable cause to arrest based on identification of perpetrator by victim); *see also United States ex rel. Burbank v. Warden, Illinois State Penitentiary*, 535 F.2d 361, 365-66 (7th Cir. 1976) (probable cause to arrest based on identification of perpetrator by eyewitness), *cert. denied*, 429 U.S. 1045 (1977).

The victim also executed a complaint, alleging that Smith raped her. R. Item 37, Ex. I-1. It is well settled that Johnson's complaint provided probable cause to arrest Smith. *See Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 200 (7th Cir. 1985); *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984). The police took the complaint and Johnson before a judge, who issued a warrant for Smith's arrest after reviewing the complaint and hearing from the victim herself. R. Item 131, Final Pretrial Order, Statement of Stipulated Uncontested Facts at 5. Smith was arrested on the basis of this warrant by an officer who has never been a party to this case. R. Item 37, Ex. J-1. Clearly Smith's arrest was valid. And an arrest that would have occurred despite police misconduct cannot, as a matter of law, give rise to a claim for damages.

The opinion below, far from conflicting with *Carey v. Piphus*, 435 U.S. 247 (1978), rather depends upon *Carey* as its logical underpinning. In *Carey*, this Court held that damages for deprivation of civil rights should not be presumed "and that plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions." *Id.* at 262. Without proof of actual injury, the Court held that plaintiffs could recover only nominal damages, *id.* at 266, like the damages awarded to Smith in this case. The Court reached this conclusion based upon "the basic purpose of a § 1983 damages award," which is "to compensate persons for injuries caused by the deprivation of constitutional rights." *Id.* at 254. This Court has reaffirmed the principle from *Carey* that a

plaintiff could recover only nominal damages where he suffered no actual injury. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). In *Stachura*, the Court explained *Carey* as holding that "[w]here no injury was present, no 'compensatory' damages could be awarded." *Id.* at 308. If no unlawful arrest or other discrete injury flowed from the fabrication of evidence in this case, there is no claim for damages under these precedents.[4]

Smith also claims that the opinion below conflicts with *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). A claimed intracircuit conflict does not merit review in this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974). In any event, there is no conflict with *Jones*. In *Jones*, the court found that Jones' arrest was based on fabricated evidence. The state's subsequent prosecution of Jones for murder had been dropped and thus he had never been convicted of or sentenced for that murder. 856 F.2d at 991. There was a clear causal link between the defendants' unconstitutional misconduct and the plaintiff's false arrest, false imprisonment, and malicious prosecution. In this case, by contrast, Smith had

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[4] The cases that Smith cites as recognizing an exception to the damages principle announced in *Carey* do not concern the measure of damages recoverable in a section 1983 action, but rather concern the standard for qualified immunity in a case alleging that a police officer presented misleading information in applying for an arrest warrant. *See Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987); *McLaughlin v. Alban*, 775 F.2d 389 (D.C. Cir. 1985); *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982). That standard is "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Qualified immunity was not at issue in either of the *Smith* appeals. Instead, the issue in both appeals was what measure of damages applied assuming that the police officers had fabricated the laboratory report as Smith alleged.

been arrested, charged with rape, tried, convicted, had served his sentence, and did not challenge his conviction. *Smith I*, 859 F.2d at 33-34. Because Smith did not challenge his conviction, and, indeed, could not collaterally attack it under settled section 1983 law, *see, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973), he could obtain damages only by showing that the fabricated evidence caused his false arrest, which the courts below found he could not show. Moreover, his conviction, like his arrest, was based on the victim's testimony and not the allegedly fabricated evidence.

The record in this case and the record of the criminal prosecution preclude Smith from recovering more than nominal damages. Smith was arrested, tried, and convicted of rape based upon the victim's consistent testimony against him. Smith ignores the valid basis of his arrest. He cites no authority that even remotely suggests that a person who would have been arrested anyway, notwithstanding police misconduct, can recover compensatory damages based solely on that misconduct. To the contrary, it is settled that false information gives rise to a Fourth Amendment claim only if it is the but-for cause of the search or seizure. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Smith's "position" would have been the same with or without the allegedly manufactured evidence; he would have been arrested on the basis of the victim's positive identification, her signed complaint, her statements to the judge, and the arrest warrant. The decision below correctly applied the principles announced in *Carey* and *Stachura* to the facts of this case. *Smith I* made any recovery of more than nominal damages contingent upon a factual showing that the Seventh Circuit subsequently found in *Smith II* had not been made. The decision below is consistent with this Court's cases and with the other cases cited by Smith.

B. Smith's remaining claim, that he is entitled to punitive damages, does not merit review in this Court.

Smith offered no argument that he was entitled to punitive damages in the district court or in either of his two appeals to the Seventh Circuit. Thus none of the opinions in this case considered that issue. This Court should not review a question that was never briefed or argued below. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).[5]

In any event, Smith agreed to the substitution of the City of Chicago for the other defendants in this case. *See* R. Items 148, 149, 150. Punitive damages may not be recovered under section 1983 against a municipality, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), which is the only respondent in this case. For this reason as well Smith's petition should be denied.

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[5] Smith has essentially admitted that a claim for punitive damages was not pressed below. He is currently involved in malpractice litigation against his trial counsel in this case, claiming among other things, that "plaintiff's attorney could have sought punitive damages if he had chosen to." Plaintiff's Reply Answer to the Defendants' Motion to Dismiss, No. 91-C-0029 (N.D. Ill.).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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May 23, 1991

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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79 C 2038

JUDGE BUA

Date February 21, 1989

THEODORE SMITH

v.

JERRY SPRINGER *et al*

MINUTE ORDER FORM

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

The City of Chicago is substituted as defendant in place of the individual defendants. Judgment is entered in favor of plaintiff and against City of Chicago in the amount of $1, plus attorneys' fees and costs in favor of attorney Kenneth N. Flaxman in the sum of $5,000.

* * * *

(For further detail see order attached to the original minute order form.)

/s/ AH
February 22, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2038

JUDGE BUA

THEODORE SMITH,

Plaintiff,

vs.

JERRY SPRINGER, RICHARD O'CONNELL
and DANIEL CHILLA,

Defendants.

JUDGMENT ORDER

[Docketed Feb. 22, 1989]

THIS MATTER coming to be heard for trial and upon Defendants' Motion in Limine Regarding Plaintiff's Claim For Damages Related to His Criminal Conviction, the parties and their attorneys being present in open Court on February 13, 1989, with trial scheduled to commence on that day, and the Court being otherwise fully advised in the premises, the Court FINDS as follows:

1. On February 13, 1989, the Court granted Defendants' Motion in Limine Regarding Plaintiff's Claim For Damages Related to His Criminal Conviction, holding that Plaintiff may not seek relief for damages related to, or arising from, his criminal conviction. Because Plaintiff sought no other relief, the Court further held that Plaintiff is limited to seeking nominal damages.

2. In light of the Court's ruling, the parties agreed that Defendants would consent to entry of judgment against their indemnifier, the City of Chicago, and in

favor of Plaintiff in the amount of One Dollar ($1.00). The parties agreed further that entry of such a consent judgment would not constitute an admission of liability on the part of the individual Defendants or the City of Chicago; neither would entry of such a consent judgment preclude Plaintiff from appealing this Court's ruling on Defendants' Motion in Limine. The parties further agreed that if the Seventh Circuit Court of Appeals determines that it does not have jurisdiction to hear or decide such an appeal, then this consent judgment may be vacated pursuant to Fed. R. Civ. P. 60(b) and the case set for trial. The parties agree that this Court may reserve jurisdiction for that purpose.

3. It was further agreed between the parties that a judgment for attorneys fees would be entered against the City of Chicago in an amount to be set by the Court, but not to exceed Five Thousand Dollars ($5,000.00).

4. In the interest of judicial economy, the Court approved the agreement between the parties, and directed counsel to submit the appropriate Stipulation and proposed Judgment Order on February 14, 1989.

5. Before approving the above-described agreement, the Court personally verified, in open court, that Plaintiff Theodore Smith had authorized his court-appointed attorney to enter into such an agreement and that Plaintiff found such an agreement to be acceptable in light of the Court's ruling on Defendants' Motion in Limine.

6. The Court was prepared to try this case commencing on February 13, 1989, and a jury venire was assembled in court for that purpose. The venire was released upon the Court's approval of the agreement among the parties.

7. Having reviewed the Petition for Fees submitted by Kenneth N. Flaxman, the Court finds that an award of attorneys fees and costs in the amount of Five Thousand Dollars ($5,000.00) to be paid by the City of Chicago to

Kenneth N. Flaxman is reasonable under all the circumstances of this case.

Based upon the above findings, IT IS HEREBY ORDERED as follows:

(a) Judgment is entered against the City of Chicago and in favor of Plaintiff Theodore Smith in the total amount of One Dollar ($1.00).

(b) Said judgment does not constitute an admission or finding of liability on the part of the City of Chicago or Defendants Jerry Springer, Richard O'Connell and Daniel Chilla, and does not preclude them from contesting liability to Plaintiff in the event that the judgment is reversed by an appellate tribunal.

(c) Judgment for attorneys fees and costs is entered against the City of Chicago and in favor of attorney Kenneth N. Flaxman in the total amount of Five Thousand Dollars ($5,000.00). Said judgment for attorneys fees and costs constitutes a final settlement of all fees and costs accrued to date.

ENTER:

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge
United States District Court

Dated 2/21/89

(1) THESMITH.ORD